Team No. 18

No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

-v.- D.C. No. 155-CV-2013

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU, D.C. No. 165-CV-2013

Intervenor-Plaintiff-Appellant, Cross-Appellee,

-v.-

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PROGRESS

Brief for MALEAU,
Defendant-Appellant, Intervenor-Plaintiff-Appellant

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STATEMENT OF JURISDICTION

This case is on appeal from the United States District Court for the District of Progress, which had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, a law of the United States. 28 U.S.C. § 1331 (2006). On July 23, 2012, the district court denied Jacques Bonhomme's (Bonhomme) motion to dismiss and granted Shifty Maleau's (Maleau) motion to dismiss. Bonhomme, Maleau, and the State of Progress (Progress) each filed a timely Notice of Appeal. The district court's order is a final decision, and this Court therefore has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

ISSUES PRESENTED

1. Whether Bonhomme is the real party in interest under Fed. R. Civ. P. 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. Whether Bonhomme—a foreign national—is a "citizen" under CWA § 505, 33 U.S.C. § 1365, who may bring suit against Maleau.

3. Whether Maleau's mining waste piles are "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

4. A. Whether Reedy Creek is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).

   B. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).

5. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

This appeal arises out the district court's decision to dismiss Bonhomme's suit against Maleau on the issue of Maleau's liability under the CWA for the presence of arsenic in navigable waters, and to deny Bonhomme's motion to dismiss charges of liability under the CWA brought by Progress, with Maleau intervening. (R. 10). In the proceedings below, the district court

granted Maleau's motion to dismiss and denied Bonhomme's motion to dismiss. (R. 10). The court held that Bonhomme is not a proper plaintiff as he is neither the real party in interest in this case nor a "citizen" under the CWA, and that, even if Bonhomme were a proper plaintiff, Maleau's waste piles are not point sources and Ditch C-1 is not a navigable water. (R. 7–9). The court also denied Bonhomme's motion to dismiss because the court concluded that Reedy Creek was a navigable water, and Bonhomme added arsenic to the creek through the culvert, a point source. (R. 9). Accordingly, Bonhomme appeals the dismissal of his claim against Maleau and the denial of his motion to dismiss Progress' claim, alleging that the district court erred in finding that he was not a proper plaintiff, that Maleau's waste piles were not point sources, that Ditch C-1 is not a navigable water, and that he added arsenic to Reedy Creek. (R. 2–3). On appeal, Maleau challenges the district court's conclusion that Reedy Creek is a navigable water, and Progress challenges the court's conclusion that Ditch C-1 is not a navigable water. *Id.* This Court ordered briefing on these six issues. (R. 3).

STATEMENT OF THE FACTS

The underlying litigation between Bonhomme and Maleau, and between Progress and Bonhomme, with Maleau as intervenor, arises out of the presence of arsenic in Ditch C-1 and Reedy Creek. (R. 4–7). Bonhomme claims that Maleau is liable under the CWA for the presence of arsenic in these water bodies; Progress claims Bonhomme is liable; and Maleau claims that either Bonhomme is liable or, alternatively, that no party is liable because neither of the water bodies are navigable waters. (R. 4–5).

Maleau operates a gold mining and extraction operation that produces overburden and slag as by-products. (R. 5). Instead of dumping these by-products on the gold mining and extraction site, Maleau trucks the overburden and slag to property he owns in Jefferson County, Progress and

places it in piles adjacent to Ditch C-1. *Id*. When it rains, rainwater runoff flows through the piles and eventually enters Ditch C-1 via channels eroded by gravity, leaching and carrying arsenic from the piles into the ditch. *Id*. Ditch C-1 is a drainage ditch dug for agricultural use. *Id*. The running water contained in the ditch comes primarily from groundwater drained from the saturated soil, with some rainwater runoff following rain events. *Id*. There is running water in Ditch C-1 except during annual periods of drought, which may last up to three months. *Id*.

Ditch C-1 runs three miles before it discharges through a culvert on Bonhomme's property into Reedy Creek. *Id.* Reedy Creek is fifty miles long, beginning in the State of New Union before flowing into Progress, where it eventually discharges into Wildman Marsh. *Id*. While Reedy Creek maintains water flow throughout the year, *id.*, there is no indication that it is used for waterborne transportation, (R. 9). Wildman Marsh is a wetland contained partially within the Wildman National Wildlife Refuge, a major destination for migratory birds and duck hunters. (R. 5–6). Bonhomme's property fronts part of the wetlands, and he has used the wetlands in the past for recreational activities. (R. 6). Both Reedy Creek and Wildman Marsh undoubtedly contribute to interstate commerce, as Reedy Creek is used for agricultural purposes, and Wildman Marsh is used for recreational purposes. (R. 5–6).

Prior to suing Maleau, Bonhomme tested the waters of both Reedy Creek and Ditch C-1. (R. 6). In Ditch C-1, Bonhomme found high arsenic concentrations downstream of Maleau's property, whereas upstream of his property, the waters contained no detectable arsenic. *Id*. As for Reedy Creek, downstream of the discharge of water from Ditch C-1 contains significant concentrations of arsenic, while upstream of the discharge contained no detectable arsenic. *Id*. Bonhomme also found traces of arsenic in Wildman Marsh. *Id*. While the arsenic was not found to originate from Maleau's waste piles, the district court assumed the waste piles to be the source

of the arsenic at the motion to dismiss stage. *Id.*

After discovering the arsenic in Ditch C-1, Reedy Creek, and Wildman Marsh, Bonhomme sued Maleau via the CWA's citizen suit provision, alleging that he violated the CWA by adding arsenic from his waste pile into Reedy Creek and Ditch C-1, both of which he alleges are navigable waters. (R. 4–5). Maleau filed a motion to dismiss, alleging that Bonhomme could not bring suit, as he is neither the real party in interest under the Federal Rules of Civil Procedure (FRCP) nor a "citizen" under the CWA, and that even if Bonhomme were a proper plaintiff, Maleau is not liable because the waste piles are not point sources and Reedy Creek and Ditch C-1 are not navigable waters. (R. 7–10). In a separate suit, in which Maleau intervened as a matter of right, Progress alleged that Bonhomme violated the CWA by discharging arsenic from his culvert into Reedy Creek. (R. 5). Bonhomme filed a motion to dismiss, alleging that Maleau was the liable party. (R. 5, 9). Upon a motion by Progress and Maleau, the district court consolidated these two cases. (R. 5). The district court granted Maleau's motion to dismiss and denied Bonhomme's motion to dismiss (R. 10), and this case is now in this Court on appeal.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Bonhomme is not a proper plaintiff and cannot bring suit because he is not the real party in interest in this litigation. Bonhomme does not meet the requirements of FRCP 17(a) and, therefore, is not able to bring this suit on behalf of Precious Minerals International (PMI). PMI is the appropriate real party in interest because it bears the cost of water testing and analysis as well as the litigation costs in this action. Furthermore, any financial loss from a diminishment in hunting parties is suffered by PMI, not by Bonhomme personally. Since Maleau first became involved in this action, he has insisted that Bonhomme correct his pleadings to reflect the fact that PMI is the appropriate real party in interest.

Bonhomme's action should be dismissed by this Court because he has had ample time to correct his pleadings and has failed to do so.

The district court was also correct to hold that Bonhomme, a foreign national, cannot pursue a citizen-suit under CWA § 505. Such suits can only be brought by "citizens," a class that includes individual United States citizens and domestic entities such as States and domestic corporations, but not foreign nationals. This interpretation of "citizen" in CWA § 505 is compelled by Congress's traditional use of that term—rather than broader terms such as "person"—to refer to domestic entities. Any alternative interpretation that makes "citizen" a synonym for "person" would deprive "citizen" of any independent significance, violating the longstanding principle that statutes should be construed to give effect to every word. Congress's choice to limit the class of allowable citizen-plaintiffs in the CWA is perfectly reasonable given the fact that such plaintiffs act as private attorneys general; the ability to act "on behalf of the public" in such a manner is a hallmark of rights limited to citizens.

Even if Bonhomme is a proper plaintiff, the district court was correct to hold that the waste piles are not point sources. The piles are not "conveyances" that transport pollutants into navigable waters; rather, the piles are the source of pollutants. Furthermore, any stormwater that runs off of the piles and into Ditch C-1 does so in a natural and unimpeded manner and is thus not a "discharge from a point source." In fact, it is only while inside Ditch C-1 that stormwater carrying pollutants becomes channelized, thus making the ditch itself and its terminating culvert—not the waste piles—a "point source." Even if Ditch C-1 was deemed by this Court to be a navigable body of water, the fact that stormwater runoff from the waste piles enters it without first being collected or channeled by man makes the runoff nonpoint source pollution.

However, even if this Court found Maleau's waste piles are point sources, neither Reedy

Creek nor Ditch C-1 are navigable waters under the CWA, and thus Maleau would not be liable under the CWA for the runoff from the waste pile into these water bodies. In the United States Supreme Court case *Rapanos v. United States*, two different definitions for navigability were espoused by Justices Scalia and Kennedy, and it is unclear which definition is controlling. However, both definitions generally require that for a water body to be a navigable water under the CWA, it must either be itself among the "waters of the United States" or connected in some way to such a water body. Reedy Creek and Ditch C-1 meet neither of these criteria. Reedy Creek cannot be considered among the waters of the United States because there is no evidence indicating that it is either "relatively permanent, standing or continuously flowing" or "traditionally navigable." Furthermore, Reedy Creek is not connected in any way to another navigable water, as neither Wildman Marsh nor Ditch C-1 is a navigable water. Accordingly, Reedy Creek is not a navigable water.

Nor can Ditch C-1 be considered a navigable water. Like Reedy Creek, there is no evidence indicating that Ditch C-1 is itself among the waters of the United States, and since Reedy Creek is the only water body Ditch C-1 is connected to, it cannot be said it is connected in any way to another navigable water. However, even if this Court were to find that Reedy Creek is a navigable water, Ditch C-1 would still not meet the "connected to" test of either Justice Scalia or Justice Kennedy, as Ditch C-1 is a point source (thus failing Justice Scalia's test) and there is no evidence that it has a "significant nexus" to any navigable-in-fact body of water (thus failing Justice Kennedy's test). Accordingly, Ditch C-1 is not a navigable water, and any discharge into the ditch would not make Maleau liable under the CWA.

However, if this Court does find that Reedy Creek is a navigable water body, this Court must find that Bonhomme, not Maleau, is liable for a discharge under CWA § 301 because he has

added arsenic to the Creek without a required permit. Bonhomme's culvert operates as a point source that introduces pollutants to Reedy Creek. Bonhomme is liable for the addition even if his culvert is not the original source of the arsenic because the language of the CWA does not require that a polluter have been the initial creator of the pollutant. The CWA was written broadly in order to hold people like Bonhomme liable for polluting waters of the United States. Therefore, this Court should find that Bonhomme is liable for the addition and is in violation of CWA § 301.

STANDARD OF REVIEW

This case involves an appeal from the district court's denial of Bonhomme's motion to dismiss and its grant of Maleau's motion to dismiss. The issues before this Court are pure questions of law and, therefore, should be reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Accordingly, this Court need not afford deference to the district court's legal conclusions. *Williams v. Taylor*, 529 U.S. 362, 400 (2000). Dismissal is appropriate if the facts, when viewed in a light most favorable to the plaintiff, do not state a claim to relief that is "plausible on its face." *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

ARGUMENT

I. BONHOMME IS NOT THE REAL PARTY IN INTEREST BECAUSE HE IS NOT AUTHORIZED TO BRING THIS ACTION UNDER FRCP 17(A), AND HE DOES NOT HAVE A SIGNIFICANT INTEREST IN THE OUTCOME OF THE LITIGATION.

According to the Federal Rules of Civil Procedure, an action must be brought by "the real party in interest." Fed. R. Civ. P. 17(a)(1). In order to be the real party in interest, a party must have a "significant interest" in the outcome of the litigation. *Wilsey v. Eddingfield*, 780 F.2d 614, 616 (7th Cir. 1985); *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th

Cir. 1973); *Betar v. De Havilland Aircraft of Can., Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979). In many business contexts, the party that bears the financial loss is the real party in interest. *See, e.g.*, *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 381 (1949) (holding in insurance context, real party in interest is party that bears monetary loss). The language of the FRCP 17(a) provides that the real party in interest may be an executor, administrator, guardian, bailee, trustee, party in a contract for another's benefit, or party authorized by statute. Fed. R. Civ. P. 17(a)(1)(a)-(g). Bonhomme does not meet any of these criteria, and therefore he cannot bring suit against Maleau. Since Bonhomme has failed to timely amend his pleadings to make PMI the real party in interest and the rightful plaintiff in his action, this Court should uphold the dismissal of Bonhomme's action.

A. Bonhomme does not meet any of the "real party in interest" requirements and, therefore, he is not entitled to sue on behalf of PMI.

Bonhomme's connection to PMI is not one that makes him the real party in interest. Bonhomme initiated this suit as President of PMI. (R. 6). Although he holds that position and serves on the Board of Directors (R. 7), those titles alone do not entitle him to sue in his own name for any losses suffered by the company. *See* Fed. R. Civ. P. 17(a)(1). Bonhomme does not live at the lodge located next to Wildman Marsh (R. 7), and in fact "uses it only for hunting parties composed primarily of business clients and associates of PMI." (R. 7–8). Although Bonhomme has expressed that a personal fear of using the marsh has dissuaded him from continuing PMI's hunting parties (R. 6), these individual fears of contamination do not authorize him to bring a suit for an action that would properly be brought by the corporation.

Even if Bonhomme does suffer some indirect personal harm in connection with this action, he is still not entitled to bring this suit. Where a shareholder wishes to bring suit instead of a corporation, the shareholder rule may apply. However, the shareholder rule "holds that a

shareholder generally cannot sue for *indirect* harm he suffers as a result of an injury to the corporation." *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008) (emphasis added). Accordingly, Bonhomme is not a real party in interest and is not entitled to bring this suit.

B. PMI is the appropriate real party in interest because it bore the cost of the chemical analysis and suffers any financial loss from any diminishment of the frequency of its hunting parties due to contamination of the waters.

PMI, not Bonhomme, is the real party in interest in this case. PMI paid for the sampling and analysis of Ditch C-1 and Reedy Creek that serves as the basis of this litigation, and PMI is providing the costs for the attorney and expert witnesses in this case. (R. 7). Furthermore, it is PMI, not Bonhomme, that has borne the majority of any financial loss in these matters. Bonhomme has only a three percent interest in the company. *Id.* His interest is not significant enough to entitle him to recover in place of the corporation.

Bonhomme argues that the condition of the marsh has reduced the amount of hunting parties that have been hosted at the lodge. (R. 6). However, any loss from a reduction in hunting parties is borne by PMI, not by Bonhomme as an individual. The hunting parties that PMI hosts are comprised primarily of business contacts. *Id.* It is PMI "for whose benefit those parties have been held." *Id.* Accordingly, PMI is the real party in interest, not Bonhomme.

C. Bonhomme's action should be dismissed by this Court because he has had adequate time to adjust his pleadings to reflect the proper real party in interest and has failed to do so.

The district court correctly determined that Bonhomme is not the real party in interest in this action. Maleau has given Bonhomme ample time to correct his pleadings to reflect PMI as the real party in interest (R. 7), but he has continually failed to do so. Accordingly, this Court should uphold the district court's grant of Maleau's motion to dismiss.

According to the language of FRCP 17(a), an action may not be dismissed by this Court for failure to prosecute in the name of the real party in interest until, "after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a)(3). Beyond that requirement, the rule does not give any guidance as to the amount of time that is appropriate or necessary before the action may be dismissed by a court. *See generally In re Signal Int'l, LLC*, 579 F.3d 478, (5th Cir. 2009).

Courts consider a number of factors in determining the appropriateness of timing. Relevant factors include: (1) "when the defendant knew or should have known about the facts giving rise to the plaintiff's disputed status as a real party in interest"; (2) "whether the objection was raised in time to allow the plaintiff a meaningful opportunity to prove its status"; (3) "whether it was raised in time to allow the real party in interest a reasonable opportunity to join the action if the objection proved successful"; and (4) "other case-specific considerations of judicial efficiency or fairness to the parties." *Id.* at 488.

The biggest concern for courts is typically that a defendant will wait to present the real party in interest issue as a defense. *See, e.g., United HealthCare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir. 1996) (raising the issue one week before trial resulted in a waiver of defense); *Hefley v. Jones*, 687 F.2d 1383 (10th Cir. 1982) (defense raised sixteen days before trial constituted waiver). The concern is that a defendant will "'lay behind the log' in ambush," thereby "hinder[ing] the 'goal of judicial efficiency.'" *Signal Int'l*, 579 F.3d at 488.

In this case, Maleau initially raised the issue of the real party in interest in his answer to Bonhomme's complaint. (R. 7). Maleau has acted dutifully and has not attempted to blindside Bonhomme or "lay behind the log." In raising the issue from the start of this litigation, Maleau provided Bonhomme an early opportunity to substitute PMI as the real party in interest and,

alternatively, allowed PMI the chance to join the litigation. *Id.* Bonhomme has had more than enough time to substitute PMI as the proper plaintiff, and PMI has had ample time to join this litigation, yet Bonhomme has failed to amend his pleadings. If Bonhomme intended to do so, he could have amended his pleadings long before this Court was presented with this case. Since he has failed to timely remove himself from this litigation and substitute PMI, his action against Maleau should be dismissed. Because PMI is the real party in interest but is not the plaintiff listed in Bonhomme's pleadings, this Court should uphold the district court's dismissal of Bonhomme's suit.

II. BONHOMME IS NOT A "CITIZEN" FOR PURPOSES OF THE CWA CITIZEN-SUIT PROVISION, CWA § 505, AND CANNOT PROCEED WITH HIS SUIT.

The district court was also correct in concluding that Bonhomme's suit should be dismissed because he is not a "citizen" for purposes of the CWA's citizen-suit provision, CWA § 505, 33 U.S.C. § 1365 (2006). (R. 8). This result is compelled by the plain text of the CWA when read in light of the traditional meaning of the term "citizen" to refer to domestic entities such as individual United States citizens and business entities incorporated in the United States. *See, e.g.*, *United States v. Gaggi,* 811 F.2d 47, 54 (2d Cir. 1987) ("As a matter of common usage the term 'citizen' is properly understood as a native or naturalized person who owes allegiance to a government and who is entitled to reciprocal protection from it."). The underlying policy aims of the citizen-suit provision of the CWA also strongly suggest that Congress did not intend for foreign nationals such as Bonhomme to make use of CWA § 505. For these reasons, this Court should affirm the holding of the district court on this issue and dismiss Bonhomme's suit.

A. The plain text of the CWA makes it clear that foreign nationals such as Bonhomme may not pursue citizen-suits under CWA § 505.

The CWA provides in relevant part that "any citizen may commence a civil action on his

own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). "Citizen" is defined as "a person or persons having an interest which is or may be adversely affected," *id.* § 1365(g), and "person" is defined in a separate section of the CWA as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." *Id.* § 1362(5). While these definitions make it clear that "citizen" in the CWA includes more than individual United States citizens, the "definition of the narrow concept of a 'citizen' of the United States as the broader concept of a 'person,' does not deprive 'citizen' of its meaning." (R. 8). A contrary interpretation of "citizen"—one that turns the term into a mere synonym for "person"—is unconvincing given the historical distinction between "citizen" and the broader term "person," a distinction manifest in numerous federal statutes and the Constitution. *See, e.g.*, 42 U.S.C. § 1983(a) (2006) (referring separately to "any citizen of the United States" and "other person[s] within the jurisdiction thereof"). Such an interpretation also runs contrary to the principle that statutes should be construed to give each term independent effect. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). For these reasons, CWA § 505 is best understood as allowing suits by individual United States citizens, governmental entities, and domestic organizations—not foreign nationals such as Bonhomme.

The term "citizen" has historically been used to refer to a smaller set of domestic entities than broader terms such as "person." This distinction is perhaps most striking in the text of the Fourteenth Amendment, which provides, in consecutive clauses, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States," U.S. Const. amend. XIV, § 1 (emphasis added), and that "[no] State [shall] deprive any *person* of life, liberty, or property, without due process of law." *Id.* (emphasis added). The

Fourteenth Amendment's use of "citizen" as distinct from "person" "underscored that the [two] terms . . . were not considered coextensive in the Constitution." *Fletcher v. Haas*, 851 F. Supp. 2d 287, 294 (D. Mass. 2012).

In the nearly 150 years since the passage of the Fourteenth Amendment, Congress has consistently used "citizen" to refer to United States citizens or, more broadly, domestic entities including domestic corporations, and "person" or "individual" to refer to a broader class that includes foreign nationals and aliens. *Compare Gaggi*, 811 F.2d at 54 (holding that the prohibition in 18 U.S.C. § 241 against "conspir[acies] to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege" requires that the victim be a United States citizen), *with Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding that Title VII of the Civil Rights Act protects both citizens and non-citizens alike because of the use of the term "any individual" to refer to the protected class). Accordingly, the fact that Congress chose to use the term "citizen" in CWA § 505(a) is strong evidence of its intent to limit the class of CWA citizen-plaintiffs to domestic entities such as individual United States citizens and government entities—a class that does not include Bonhomme, who is a foreign national. The choice of "citizen" is particularly striking given that Congress could have easily used the term "person" instead, as it did in other portions of the CWA. *See, e.g.*, 33 U.S.C. § 1311(a) (2006) ("[T]he discharge of any pollutant by any *person* shall be unlawful.") (emphasis added).

Though "citizen" is defined as "a person or persons having an interest which is or may be adversely affected" in CWA § 505(g), this provision is best understood not as a drastic redefinition of a term with a well-established meaning, but rather as the recitation of an Article III standing requirement needed to bring suit, separate from the citizenship requirement inherent in the term "citizen." The legislative history of the CWA supports this reading. *See* S. Rep. No.

92-1236, at 146 (1972) (Conf. Rep.) ("It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the . . . Supreme Court in . . . *Sierra Club v. Morton*[, 405 U.S. 727 (1972), relating to Article III standing].").

Interpreting "citizen" to be a synonym for "person" in CWA § 505(a) is problematic for another reason: such a reading robs "citizen" of any independent significance, violating the longstanding principle that a statute should be read in such a way "to give effect, if possible, to every clause and word of [the] statute." *Duncan*, 533 U.S. at 174 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). In the context of the CWA, the Supreme Court has interpreted the term "navigable" in the phrase "navigable waters" in CWA § 404(a) to retain some semblance of its traditional meaning despite the definition of "navigable waters" in terms of the broader "waters of the United States" in CWA § 502(7). *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 171-72 (2001). In doing so, the Court noted that "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute." *Id.* at 172. CWA § 505 presents a very similar situation: "citizen," like "navigable waters," is used in a substantive provision in one place in the statute and defined in a separate place in terms of a broader concept; like "navigable waters," "citizen" should not be construed in a way that robs it of both its independent statutory significance and its traditional meaning.

B. The policy aims behind CWA § 505 also support the conclusion that Bonhomme cannot pursue his lawsuit.

The policy behind the citizen-suit provision of the CWA also counsels a relatively narrow reading of "citizen" that does not include Bonhomme in its ambit. The citizen-suit provision is intended to help "protect and advance the public's interest in pollution-free waterways rather than . . . promote private interests." *Pa. Envtl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431,

434 (M.D. Pa. 1989). Thus, unlike plaintiffs who sue to vindicate individual rights—for instance, plaintiffs suing under Title VII of the Civil Rights Act, which protects foreign nationals residing in the United States as well as citizens, *see Espinoza*, 414 U.S. at 95—CWA citizen-plaintiffs act as "private attorneys general . . . who ensure that [polluters] comply with the [CWA] even when the government's limited resources prevent it from bringing an enforcement action." *Natural Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 503 (3d Cir. 1993). Given that "the protection of the public good, rather than a private right, features most prominently in the categories of citizen-only rights," *Haas*, 851 F. Supp. 2d at 296, it is not surprising that Congress would have limited the power to act on behalf of the public to individual United States citizens and domestic citizen-like entities. For the forgoing reasons, Bonhomme is not a citizen under the CWA, and this Court should uphold the dismissal of his suit against Maleau.

III. THE PILES OF MINING WASTE DO NOT CONSTITUTE POINT SOURCES UNDER CWA § 502.

Even if Bonhomme is a proper plaintiff and can bring suit, Maleau has not violated CWA § 301(a), 33 U.S.C. § 1311(a), because the mining waste piles are not "point sources" within the meaning of the CWA. The piles themselves are not "discrete conveyances" through which pollutants are channeled into Ditch C-1 or Reedy Creek, and they therefore cannot be point sources. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("A point source is, by definition, a 'discernible, confined, and discrete *conveyance*.'") (emphasis in original). Moreover, any stormwater runoff that passes through the waste piles and eventually makes its way to Ditch C-1 does so "in a natural and unimpeded manner"; therefore, such runoff "is not a discharge from a point source." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds sub nom. Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013). Any runoff from the piles that does eventually get "channeled" to Reedy

Creek does so only via Ditch C-1, which is itself a point source; for reasons explained *infra* Part V, it is Bonhomme who is liable for CWA violations associated with these discharges.

A. The waste piles themselves are not point sources because they are not "discrete conveyances" for pollutants.

CWA § 301(a) prohibits "the discharge of any pollutant by any person" without an appropriate permit. 33 U.S.C. § 1311(a). CWA § 502(12) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12), and "point source" is defined in CWA § 502(14) as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14). Although the term "point source" must be construed broadly, *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009), it only includes in its scope those instrumentalities that actually *transport* pollutants; that is, a point source must be a *conveyance*. *Miccosukee Tribe*, 541 U.S. at 105. This interpretation of a "point source" as a means of transport is based on the plain meaning of "conveyance," *see Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, No. 3:09-cv-00255-TMB, 2013 WL 1614436, at *15 (D. Alaska Mar. 28, 2013), as well as the examples of point sources listed in CWA § 502(14) ("pipe, ditch, channel, tunnel, conduit," etc.), *see United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993).

This definition of a point source as a conveyance simply does not describe Maleau's pile of rocks and dirt. The pile itself does not actually "convey" or "transport" anything, but rather acts as a *source* of arsenic. Any arsenic that makes its way into Ditch C-1 does so through stormwater runoff; it is *conveyed* from the waste piles to the ditch by stormwater. (R. 4–5). This is similar to the situation in *Cordiano*, in which the Second Circuit held that a berm containing bullets from a

shooting range was not a "point source" of lead because there was "no evidence that [the] lead deposited into the berm directly flow[ed] into" any navigable waters. 575 F.3d at 224. Rather, any lead that made its way into water adjacent to the berm did so "only as part of surface water runoff, which results from rain or flooding." *Id.* Similarly, any arsenic from the piles only enters Ditch C-1 and Reedy Creek via stormwater runoff, and therefore the piles are not point sources.

B. Stormwater runoff from the waste piles is not a "discharge from a point source" until it exits Ditch C-1 at Bonhomme's culvert.

Stormwater runoff containing arsenic from the piles *could* constitute discharge from a point source, but only if it were channeled or collected before entering a jurisdictional body of water. *Brown*, 640 F.3d at 1070 ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source."). In this case, such channeling only occurs inside Ditch C-1. Thus, it is Ditch C-1 and its terminating culvert, and not the waste piles, that are a point source of pollutants. *See Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000) ("The structure of the CWA's definition of 'point source' . . . connotes the *terminal end* of an artificial system for moving water, waste, or other materials.") (emphasis added). And even if this Court were to hold that Ditch C-1 is *not* a point source, but rather a jurisdictional body of water or an "intervening conduit" between the piles and Reedy Creek, the waste piles do not discharge pollutants through a point source into a navigable body of water because runoff from the piles enters the ditch in a natural and unimpeded manner. *See Brown*, 640 F.3d at 1070.

1. Ditch C-1 and its terminating culvert—not the waste piles—are point sources.

Ditch C-1 collects stormwater runoff from the waste piles and transports that runoff to Bonhomme's property, where it is discharged through a culvert into Reedy Creek. (R. 5). This type of channeling is the *essence* of what a point source does. *See Plaza Health*, 3 F.3d at 646

("[T]he examples given [of a point source in CWA § 502(14)] . . . evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways."). Indeed, the statutory definition of "point source" includes "ditch" as one of its examples. 33 U.S.C. § 1362(14).

Since a point source is a structure that *discharges* pollutants into navigable waters, it is the ditch and its terminating culvert, if anything, that are point sources, not the waste piles. *See Froebel*, 217 F.3d at 937. As the Second Circuit noted in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, a point source "refers only [to] the proximate source from which the pollutant is directly introduced to the destination water body. A pipe from a factory draining effluent into a navigable water is a point source, but the factory itself is not." 273 F.3d 481, 493 (2d Cir. 2001). The waste piles—like the factory in the court's example—may be the *origin* of pollutants, but they are not point sources.

The Supreme Court's seminal CWA decision in *Rapanos v. United States* does not alter this analysis. A plurality of the Court in that case did not overturn the reasoning of *Trout Unlimited* and *Froebel*, but rather endorsed that reasoning as one of two ways of thinking about "intervening conduits"—such as Ditch C-1—that convey pollutants to navigable waters but are not the origin of those pollutants. *See Rapanos v. United States*, 547 U.S. 715, 743-44 (2006). While it might be appropriate in some instances to consider such conduits to not be point sources themselves, and to instead view the original sources of pollutants as point sources, that is simply not the case when the conduit is a ditch—one of a small number of statutorily designated point sources. *See* 33 U.S.C. § 1362(14).

2. Even if Ditch C-1 is a navigable body of water or a non-"point source" intervening conduit, stormwater runoff from the piles enters the ditch in a natural and unimpeded manner, and is thus not a point source discharge.

If this Court were to hold that Ditch C-1 is either a navigable body of water or a non-"point source" intervening conduit conveying runoff to Reedy Creek, Maleau would still not be in violation of CWA § 301(a) because stormwater runoff from the waste piles enters the ditch in a "natural and unimpeded manner." *See Brown*, 640 F.3d at 1070. Such runoff is precisely the type of nonpoint source pollution that Congress intended to exempt from the National Pollutant Discharge Elimination System (NPDES) permitting scheme under CWA § 301. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("Congress [h]as classif[ied] nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants."). The fact that arsenic in the ditch might be "traceable" to the waste piles is irrelevant; point source pollution is not distinguished by whether the original source of pollutants can be easily determined, "but rather by *whether the pollution reaches the water through a confined, discrete conveyance*." *Aurora Energy*, 2013 WL 1614436, at *14 (quoting *Brown*, 640 F.3d at 1071) (emphasis in original). In the present case, stormwater runoff does not enter the ditch through a discrete conveyance.

The situation here is similar to that considered by the Ninth Circuit in *Greater Yellowstone Coalition v. Lewis*. In that case, the court held that a waste rock pit through which runoff might flow was not a point source because any runoff would "not [be] collected or channeled, but [would] instead filter[] through [the pit and the ground below], eventually entering the surface water." 628 F.3d 1143, 1153 (9th Cir. 2010). Although the pit in *Greater Yellowstone* resembles some of the examples of "point sources" listed in CWA § 502(14) far more than the waste piles in this case do, *see* 33 U.S.C. § 1362(14) (listing wells and containers as examples of point

sources), the court concluded that the pit was not a point source because water filtered through it "in a natural and unimpeded manner." *Greater Yellowstone*, 628 F.3d at 1153 (internal quotations and citations omitted). This is the case here as well: since Maleau has not done anything to channel, collect, or interfere with the flow of stormwater runoff from the waste piles, any runoff entering Ditch C-1 is not a "point source discharge."

Sierra Club v. Abston Construction Co. does not counsel a different result. While the Fifth Circuit in that case held that "[a] point source of pollution *may* . . . be present where miners design spoil piles . . . such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water," 620 F.2d 41, 45 (5th Cir. 1980) (emphasis added), there are a number of reasons why this holding should not be given too much weight. First, in crafting its holding, the court in *Abston* was dealing with a very different factual situation from the present case. The mining companies in *Abston* were alleged to have constructed basins to catch sediment carried by stormwater runoff, basins which sometimes overflowed, causing pollutants to enter a creek. *Id* at 43. In the present case, by contrast, Maleau is not alleged to have done anything beyond placing waste rock into piles. Although the *Abston* court did not rely solely on the mining companies' basin construction activities in framing its holding, that holding should be read in light of the factual scenario of the case lest it be construed too broadly. *See, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978) ("[I]t is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (internal citations and quotations omitted).

More importantly, the *Abston* court did not have the advantage of the Environmental Protection Agency's (EPA) interpretation of the meaning of "discharge of a pollutant" when rendering its decision. EPA promulgated regulations in 1983 (three years after *Abston*)

specifying that "[d]ischarge of a pollutant . . . includes additions of pollutants into waters of the United States from . . . surface runoff which is collected or channelled *by man*." 40 C.F.R. § 122.2 (2012) (emphasis added). This language indicates that some human effort must be put towards the channeling or collecting *of runoff* before such runoff is deemed a discharge from a point source. Such a requirement is in line with the distinction drawn by the Ninth Circuit in *Greater Yellowstone* between water running off the top of a waste rock pit cover into a man-made stormwater drain system—"exactly the type of collection or channeling contemplated by the CWA," 628 F.3d at 1152—and water seeping through the pit cover and filtering through waste rock and (eventually) into surface waters—"nonpoint source pollution because there is no confinement or containment of the water." *Id.* at 1153. The runoff channeled off the top of the waste rock pit cover and through the stormwater system was channeled "by man," whereas the runoff filtering through the waste rock was not. In the present case, the only channeling "by man" is done inside Ditch C-1.

The waste rock piles are not point sources within the meaning of the CWA. They are not "discrete conveyances" because they do not transport pollutants, and runoff from the piles is not "discharged from a point source" until it is deposited into Reedy Creek by Ditch C-1, thus making the ditch and its terminating culvert—not the waste piles—point sources. Finally, because water runs off naturally from the waste rock piles into Ditch C-1 without any channeling by man, it is nonpoint source pollution upon entering the ditch. For these reasons, this Court should hold that the waste piles are not point sources, and that Maleau can therefore not be liable under the CWA.

IV. EVEN IF THIS COURT WERE TO HOLD THAT THE WASTE PILES ARE POINT SOURCES, NEITHER REEDY CREEK NOR DITCH C-1 IS A NAVIGABLE WATER, AND THUS MALEAU IS NOT LIABLE UNDER THE CWA.

Under the CWA, an illegal "discharge of a pollutant" is defined as "any addition of any pollutant to *navigable waters* from any point source." 33 U.S.C. § 1362(12) (emphasis added). The term "navigable waters" is, in turn, defined as including "the waters of the United States," *id.* § 1362(7), a phrase that is given a broad definition by the EPA. *See* 40 C.F.R. § 122.2 (including within definition "[a]ll interstate waters, including interstate 'wetlands'" and all waters that could affect interstate commerce). The Supreme Court has recently narrowed the phrase "waters of the United States" to cover less than this broad definition would otherwise suggest. *See Rapanos*, 547 U.S. at 739-41 (finding the term "navigable waters" to include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features'" and other waters with a "hydrologic connection" to such waters). Some water bodies that would have been characterized as "navigable waters" prior to *Rapanos* have been found by lower courts to lack that distinction following the Supreme Court's decision. *Compare United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (a pre-*Rapanos* decision finding that a drainage ditch that "flow[ed] only intermittently" was a navigable water) *with United States v. Robinson*, 505 F.3d 1208, 1223 (11th Cir. 2007) (a post-*Rapanos* decision holding that a stream, which was undoubtedly a tributary of a navigable water and flowed continuously, was not a navigable water).

Since the *Rapanos* decision was a 4-1-4 decision, there has been uncertainty over whether lower courts are to follow Justice Scalia's plurality opinion or Justice Kennedy's concurring opinion, which define the scope of navigable waters differently. *See Robinson*, 505 F.3d at 1221 (adopting Justice Kennedy's approach); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d

1210, 1220 (D. Or. 2009) (adopting Justice Scalia's approach); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (declining to adopt either approach); *see also Marks v. United States*, 430 U.S. 188, 193 (1977) (suggesting that, in a decision where "no single rationale . . . enjoys the assent of five Justices," the holding of the Court can be considered "as that position taken by those Members who concurred in the judgments on the narrowest grounds") (citation omitted). Under Justice Scalia's approach, navigable waters include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features'" and other waters with a "hydrologic connection" to such waters, *Rapanos*, 547 U.S. at 739-41, while under Justice Kennedy's definition, navigable waters include "traditionally navigable" waters and those with a "significant nexus" to such waters. *Id.* at 779 (Kennedy, J., concurring). Regardless of which approach this Court adopts, however, neither Reedy Creek nor Ditch C-1 is a navigable water. Accordingly, regardless of whether the mining waste piles are point sources or a point source, Maleau is not liable under the CWA and the dismissal of Bonhomme's suit should be upheld.

A. Reedy Creek is not among the "waters of the United States," nor is it connected to any such waters, and it is thus not a "navigable water" under the CWA.

Under either the Scalia or Kennedy approach, a water body must be either among the "waters of the United States" itself or connected in some way to such a water body in order to be within the scope of the term "navigable waters" under the CWA definition. *Id.* at 739-41, 779 (Kennedy, J., concurring). While it is possible for streams and creeks to satisfy the navigable waters requirement, *see id.* at 739, it does not follow that *all* streams and creeks are navigable waters under the CWA; they must still satisfy the elements of whichever approach is used. *See, e.g., Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 822-24 (N.D. Cal. 2007) (holding that a creek was not a "navigable water" because it did not satisfy Justice Kennedy's

significant nexus test). Since there is not sufficient evidence in the Record demonstrating that Reedy Creek meets the requirements of either approach, Reedy Creek is not a navigable water, and, accordingly, is not covered by the provisions of the CWA.

1. There is no evidence in the Record to demonstrate that Reedy Creek is itself among the waters of the United States.

Under the CWA, a water body is a "navigable water" if it is among the "waters of the United States." 33 U.S.C. § 1362(7). Under Justice Scalia's approach, waters of the United States are not limited to those waters that are "traditional navigable waters," *Rapanos*, 547 U.S. at 731; however, they must at least be "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features.'" *Id.* at 739. In contrast, Justice Kennedy's approach would have the term "waters of the United States" cover only traditional navigable waters and other waters possessing a "significant nexus" to such waters. *See id.* at 759 (Kennedy, J., concurring). Regardless of which approach this Court adopts, Reedy Creek does not meet the threshold.

Under either approach, it is undisputed that Reedy Creek is not navigable in the traditional sense. Traditionally, water bodies were only considered navigable waters if they were "capable of use as interstate highways." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). In other words, Reedy Creek must be capable of being used for transportation to be "traditionally navigable." However, as noted in the Record, "[n]o one alleges that Reedy Creek is or ever has been used for waterborne transportation or could be so used with reasonable improvements." (R. 9). Accordingly, Reedy Creek cannot be among the "waters of the United States" of its own accord under Justice Kennedy's approach; it can only be considered a "navigable water" if it possesses a significant nexus to a navigable-in-fact water. *See infra* Part IV.A.2.

Even if this Court were to adopt Justice Scalia's approach, Reedy Creek would still not meet

the requirements to be among the "waters of the United States." While Justice Scalia, in outlining what is among the waters of the United States, notes that "streams . . . oceans, rivers, [and] lakes" may be among such water bodies, *id.* at 732, it does not follow that a stream or a creek automatically meets this requirement. *See Pac. Lumber*, 469 F. Supp. 2d at 822-24. Any water body, including Reedy Creek, must be "relatively permanent, standing, or continuously flowing" and form "geographic features" to be among the waters of the United States. *Rapanos*, 547 U.S. at 739. While Reedy Creek clearly forms a geographic feature, there is no evidence in the Record demonstrating that it meets any of the other criteria. The only information regarding Reedy Creek in the Record is that it is a fifty mile long water body that crosses state boundaries, that it provides the water supply for a service station on I-250, that it provides irrigation for farmers who sell products in interstate commerce, that it "maintains water flow throughout the year," and that it flows into Wildman Marsh. (R. 5). None of this information is sufficient to conclusively establish that Reedy Creek is relatively permanent, standing, or continuously flowing. While the Record notes that Reedy Creek "maintains a water flow throughout the year," *id.*, it does not say whether or not such a flow is *continuous*. "[M]aintain[ing] a water flow" suggests the presence of a flow in some capacity throughout the year, but it does not foreclose the fact that the flow may be intermittent or ephemeral, which would preclude Reedy Creek from being among the "waters of the United States." *Rapanos*, 547 U.S. at 739. Accordingly, the information about Reedy Creek in the Record is not sufficient to establish that it is "relatively permanent, standing, or continuously flowing." In fact, the Record is only sufficient to conclusively establish that Reedy Creek serves interstate commerce; however, as the district court below noted, *Rapanos* rejected the notion that "waters used in interstate commerce" are per se waters of the United States. (R. 9). They still must satisfy Justice Scalia's criteria or constitute

highways of interstate commerce. *Rapanos*, 547 U.S. at 730-33. Therefore, since the evidence does not establish that Reedy Creek is relatively permanent, standing, or continuous, it is not among the waters of the United States under Justice Scalia's approach.

2. There is no evidence in the Record to demonstrate that Reedy Creek has a surface connection with or a significant nexus to one of the waters of the United States.

Though Reedy Creek cannot be considered to be among the "waters of the United States" in its own right, the Supreme Court has held that the CWA protections also apply to certain water bodies with some connection to other "waters of the United States." Under Justice Scalia's approach, such a body is a navigable water under the CWA if it has a "continuous surface connection to bodies that are 'waters of the United States' in their own right," *Rapanos*, 547 U.S. at 742, and under Justice Kennedy's approach, such a body is a navigable water if it has a "significant nexus [to] navigable waters." *Id.* at 779 (Kennedy, J., concurring).[1] However, in order for there to be any "continuous surface connection" or "significant nexus," there must be some connection to a navigable water. Since Wildman Marsh, the only water body hydrologically connected to Reedy Creek, is not among the "waters of the United States," Reedy Creek is not a navigable water under either of these approaches.[2]

It is undisputed that Reedy Creek has a "continuous surface connection" to and a "significant nexus" with Wildman Marsh (R. 5); however, Wildman Marsh is not among the waters of the

[1] While both Justices apply their approaches to determine whether or not a wetland is a navigable water, other cases have used these two approaches and applied them to determine whether or not other water bodies are navigable waters. *See, e.g.*, *Pac. Lumber*, 469 F. Supp. 2d at 822-24 (using the significant nexus test to determine whether or not a stream is a navigable water); *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 463-65 (D.S.C. 2011) (using the significant nexus test on "ditches and swales").

[2] While it is true that Ditch C-1 is also hydrologically connected to Reedy Creek as well, Ditch C-1 is not a navigable water, *see infra* Part IV.B, so Reedy Creek's relationship to the Ditch will not be discussed in this section.

United States. The only information provided about Wildman Marsh in the Record is that it is an essential stopover for migratory birds, that it is contained within Wildman National Wildlife Refuge, and that it attracts interstate commerce as a major destination for hunters. (R. 5–6). None of these qualities demonstrates that it is "relatively permanent, standing, or continuously flowing" or a "navigable water in the traditional sense." *See supra* Part IV.A.1; *see also SWANCC*, 531 U.S. at 171-72 (rejecting the Migratory Bird Rule, which had stated that a water was a "navigable water" if it was a habitat for migratory birds). EPA has stated that wetlands, specifically wetlands like Wildman Marsh, themselves are "waters of the United States." *See* 40 C.F.R. § 122.2 ("navigable waters" includes "interstate 'wetlands,'" as well as "intrastate . . . 'wetlands' . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes."). However, this rule does not override the test espoused by Justices Scalia and Kennedy in *Rapanos*. Regardless of the rules promulgated by EPA, Wildman Marsh must meet the *Rapanos* criteria. *See Rapanos*, 547 U.S. at 739 (concluding that the Army Corps of Engineers' definition of "navigable waters," which included wetlands, was not "based on a permissible construction of the statute" (citation omitted)). Accordingly, it cannot be said that Reedy Creek has a "continuous surface connection" to or a "significant nexus" with one of the waters of the United States. Regardless of which approach this Court adopts under *Rapanos*, Reedy Creek is not a navigable water under the CWA And, therefore, Maleau is not liable under the CWA.

B. Ditch C-1 is not among the waters of the United States, nor is it connected in any way to such a water, and thus, it is not a navigable water under the CWA.

Ditch C-1 is also not a navigable water, and so any discharge into the ditch is not subject to the CWA regardless of whether Reedy Creek is a navigable water. Not only does Ditch C-1 not

meet either of the standards set forth by Justices Scalia and Kennedy, but it also cannot be considered a navigable water because it is more properly defined as a "point source" under the CWA § 502(14), and Ditch C-1 cannot be both a "point source" and a "navigable water." *See Rapanos*, 547 U.S. at 743-44.

1. There is no evidence in the Record to demonstrate that Ditch C-1 is among the waters of the United States, or is in some way connected to such a water body.

As discussed above, both Justice Scalia's and Justice Kennedy's approach requires a water body to be either itself among the waters of the United States or in some way connected to such a water body. *See supra* Part IV.A. Ditch C-1 meets neither of these qualifications and, accordingly, cannot be considered a navigable water.

It cannot be said that Ditch C-1 is among the waters of the United States under either of the *Rapanos* approaches. It is undisputed that Ditch C-1 is not "navigable in a traditional sense," as Ditch C-1 is a drainage ditch designed for agricultural purposes, not navigability. (R. 5). Thus, Ditch C-1 is not among the waters of the United States under Justice Kennedy's approach. As for Justice Scalia's standard, there is no real evidence that Ditch C-1 is "relatively permanent, standing, or continuously flowing." While it is noted in the Record that the ditch contains "running water," this is not the case during "annual periods of drought lasting from several weeks to three months." *Id.* As Justice Scalia noted in *Rapanos*, "[t]he phrase [waters of the United States] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos*, 547 U.S. at 739. Since Ditch C-1 receives its running water "from draining groundwater from the saturated soil, with some rainwater runoff after rain events" (R. 5), it is clear that Ditch C-1 is merely a "channel that periodically provide[s] drainage for rainfall" that "intermittently flows" when there are not periods of drought. Accordingly, it cannot be said that Ditch C-1 is "relatively permanent,

standing, or continuously flowing," and it is thus not among the waters of the United States based on the facts in the Record.

Ditch C-1 also does not meet the alternative standards for "navigable waters" under Justice Scalia's or Justice Kennedy's approaches. As noted above, both approaches (the surface connection test and the significant nexus test) require that a water body that is not among the waters of the United States be in some way connected to such a water body. *See supra* Part IV.A.2. However, as the Record notes, Ditch C-1 is connected only to Reedy Creek (R. 5), and Reedy Creek is not a navigable water. *See supra* Part IV.A. Therefore, it cannot be said that Ditch C-1 is a navigable water under the surface connection test or the significant nexus test.

2. Even if this Court were to find that Reedy Creek is a navigable water, Ditch C-1 is still not a navigable water.

Even if Reedy Creek is a navigable water, Ditch C-1 is not a navigable water under either of the *Rapanos* approaches. Under Justice Scalia's approach, regardless of whether a water body has a surface connection to one of the waters of the United States,[3] a body that is defined as a "point source" cannot also be a "navigable water," *Rapanos*, 547 U.S. at 735 ("[A] 'discharge of a pollutant' [is] any addition of any pollutant *to* navigable waters *from* any point source.") (citing § 1362(12)(A)) (emphasis in original); and under Justice Kennedy's approach, a water body is a navigable water only if it has a significant nexus to one the waters of the United States. *See supra* Part IV.A.2. Under either of these approaches, Ditch C-1 cannot be considered a navigable water, even if Reedy Creek is.

Under Justice Scalia's approach, something cannot be both a "point source" and a "navigable water." *Rapanos*, 547 U.S. at 735. While Justice Scalia did note that this meant that most ditches "are, by and large, *not* 'waters of the United States,'" *id.* at 736 (emphasis in original), courts

[3] It is undisputed that Ditch C-1 has a surface connection to Reedy Creek.

have found that this language does not categorically exclude ditches from being navigable waters just because they are included within the definition of point source. *See, e.g.*, *United States v. Vierstra*, 699 F. Supp. 2d 209 (D. Idaho 2010). However, while Justice Scalia may not have intended to exclude all ditches from being navigable waters, he obviously meant to exclude ditches that were considered point sources from the navigable waters definition, such as the ditch dealt with in *Rapanos*. *See* 547 U.S. at 735 ("The definitions . . . conceive of 'point sources' and 'navigable waters' as separate and distinct categories."). As discussed above, *supra* Part III.B.1., Ditch C-1 is a point source because it is a "discernible, confined and discrete conveyance . . . from which pollutants are . . . discharged." 33 U.S.C. § 1362(14). Since Ditch C-1 is a point source, it cannot be a navigable water under Scalia's approach.

Under Justice Kennedy's approach, a water body must have a significant nexus to one of the waters of the United States to be a navigable water itself. In cases analyzing whether a water body has this significant nexus to one of the waters of the Unities States (i.e. in cases applying the significant nexus test to water bodies other than wetlands), courts have been stringent in requiring a showing of a significant nexus based on biological, hydrologic, and ecologic factors. *See, e.g.*, *Robinson*, 505 F.3d at 1222; *Deerfield Plantation*, 801 F. Supp. 2d at 464; *but see United States v. Lucas*, 516 F.3d 316, 326 (5th Cir. 2008) (finding that the significant nexus test, read in light of *SWANCC*, should be interpreted to allow government jurisdiction of waters adjacent to otherwise navigable waters and their tributaries). However, regardless of these factors, Justice Kennedy's test requires a significant nexus to one of the *waters of the United States*, and such a water under Justice Kennedy's test must be a traditional navigable water. *See supra* Part IV.A.1. Since it is undisputed that Reedy Creek is not traditionally navigable (R. 9), it cannot be said that Ditch C-1 has a significant nexus to any traditionally navigable water, even if

it were demonstrated that Ditch C-1 has a biological, hydrologic, or ecologic relationship to Reedy Creek. Accordingly, Ditch C-1 is not a navigable water even if this Court were to find that Reedy Creek is a navigable water.

Neither Reedy Creek nor Ditch C-1 is a navigable water under the CWA, and therefore Maleau is not liable under the CWA, even if this Court were to find that the piles of mining waste are point sources. Furthermore, even if this Court were to find that Reedy Creek is a navigable water, Ditch C-1 is still not a navigable water, and, thus, Maleau is not liable under the CWA.

V. IF THIS COURT FINDS THAT REEDY CREEK IS A NAVIGABLE WATER, BONHOMME, NOT MALEAU, IS LIABLE FOR ANY ADDITION OF ARSENIC INTO THE CREEK, IN VIOLATION OF CWA § 301.

CWA § 301 requires an individual to obtain a permit if "five elements [are] present: (1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (emphasis in original); *see also* 33 § U.S.C. § 1311 (making "discharges" into water illegal without a permit); *id.* § 1362 (12) (defining "discharge"). While the CWA defines "pollutant," "navigable waters," and "point source," it does not address what constitutes an "addition" sufficient to trigger the permit requirement. *See* 33 U.S.C. § 1362(6), (7), (14). However, despite this lack of definition, the Supreme Court and several lower courts have addressed the addition issue and have provided some clarity. Based on these opinions, if this Court finds that Reedy Creek is a navigable water, this Court should find that Bonhomme, not Maleau, has "added" the arsenic to Reedy Creek. It is undisputed that arsenic is a pollutant as defined by the Act. (R. 8). Accordingly, this Court should find that Bonhomme's culvert is a point source that "adds" a pollutant—arsenic—to Reedy Creek. Since Bonhomme does not have a permit for this discharge, he is in violation of

the requirements under CWA § 301.

A. Bonhomme is liable for any arsenic that is conveyed to Reedy Creek through his culvert because the culvert operates as a point source and thus "adds" a pollutant to Reedy Creek "from a point source."

As noted *infra* Part III.A., a point source is defined in the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Bonhomme's culvert conveys arsenic to Reedy Creek and is thus a point source.

1. Bonhomme's culvert is a point source under CWA § 502(14) because it conveys pollutants from Ditch C-1 to Reedy Creek.

A culvert acts as a point source when it conveys pollutants to a navigable water. In *Dague v. City of Burlington*, the Second Circuit found the city's culvert to be a point source because it conveyed pollutants from a landfill into a pond. 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds,* 505 U.S. 557 (1992). Other courts that have addressed the issue of culverts as point sources have also found culverts to operate as conveyances. *See, e.g., Aiello v. Town of Brookhaven*, 136 F. Supp. 2d. 81 (E.D.N.Y. 2001). As in the forgoing cases, Bonhomme's culvert conveys a pollutant, arsenic, into a navigable water, Reedy Creek,[4] and thus the culvert is a point source.

2. Even if Bonhomme's culvert is not the original source of the pollutant, he is liable for any addition of arsenic into Reedy Creek.

A point source can still "add" a pollutant even if it is not the original source of the pollutant. The term point source "does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate source from which the pollutant is directly introduced to the destination water body." *Trout Unlimited,* 273 F.3d at 493. Therefore, a pollutant does not have to originate from the point source in order for the owner of the point source to be held liable for

[4] Assuming, *arguendo,* this Court finds Reedy Creek to be navigable.

the addition. Rather, it is enough that the point source conveys the pollutant to navigable waters. The definition of "point source" under the CWA includes many examples of conveyances that are not typically the original source of pollutants. *See* 33 U.S.C. § 1362(14). Indeed, the examples listed in CWA § 502(14) are "objects that do not themselves generate pollutants but merely transport them." *Miccosukee Tribe*, 541 U.S. at 105.

In *West Virginia Highlands Conservancy, Inc. v. Huffman*, the Fourth Circuit held that the West Virginia Department of Environmental Protection (WVDEP), as the current owner of a discharging point source, was required to obtain NPDES permits, even though it was not the original creator of the pollutant. 625 F.3d 159 (4th Cir. 2010). According to the Fourth Circuit, "there is simply no causation requirement in the statute. On its face, CWA § 301(a) bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely the current superintendent of the discharge." *Id*. at 167. The court held that although the WVDEP was engaged in reclamation efforts, as the current owner of the abandoned coal mining site at issue, WVDEP was liable for the ongoing discharge. *Id*. The court concluded that "the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur." *Id.*

Here, even if Bonhomme's culvert is not the original source of the arsenic, he is still liable for the addition of arsenic into Reedy Creek if this Court finds Reedy Creek is a navigable water. In the course of this litigation, PMI conducted and funded tests of the arsenic concentrations in Reedy Creek at different locations. (R. 7). The Record reflects that arsenic is not detectable in any meaningful concentration in Reedy Creek above where Bonhomme's culvert discharges from Ditch C-1 into Reedy Creek, but that arsenic is detectable in significant concentrations below where Bonhomme's culvert discharges into the creek. (R. 6). Because Bonhomme owns

the culvert where Ditch C-1 discharges into Reedy Creek (R. 9), he is liable for all of the arsenic that is added through that point source. Based on the studies conducted by PMI, it appears that all of the arsenic that is present in Reedy Creek has been discharged by Bonhomme's culvert. Therefore, Bonhomme is liable for all of the arsenic present in Reedy Creek.

B. Bonhomme is liable for an addition because it is through his culvert that pollutants are first introduced, and thus "added," to these waters.

An "addition" occurs when a pollutant that is not a naturally-occurring component of the water is introduced to a water body. *See U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., LLC.*, 215 F. Supp. 2d 239, 247 (D. Me. 2009) (finding that pollutants "do not naturally occur in the bay and therefore are 'additions' to the water") (citing *Trout Unlimited*, 273 F.3d at 491). A pollutant is "added" to a body of water when it is introduced to a water body from "the outside world." *Gorsuch*, 693 F.2d at 175 (upholding EPA's determination that addition occurs where a point source "physically introduces a pollutant into water from the outside world" or "when the pollutant first enters navigable waters"). It is not enough that a point source transfers pollutants between parts of the same water body. *See L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 713 (2013) ("[T]he flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA."). Since Bonhomme's culvert conveyed the arsenic to Reedy Creek and "added" it to the water in the creek, Bonhomme is liable for an addition of a pollutant to Reedy Creek and is in violation of the CWA.

1. Bonhomme added arsenic to Reedy Creek through his culvert, a point source.

Here, arsenic has been "added" to Reedy Creek because it is not a naturally-occurring component of the water. It is undisputed in this case that arsenic is a pollutant (R. 8), and it would not naturally be present at these levels in the water. Accordingly, Bonhomme's culvert

operates as a point source that introduces arsenic to Reedy Creek for the first time. Since Ditch C-1 is not a navigable water and is distinct from Reedy Creek, the culvert does not merely transfer the pollutant between different parts of the same water body. Therefore, if this Court finds that Reedy Creek is a navigable water, this Court should find that Bonhomme is liable for a discharge in violation of the CWA by adding a pollutant from his culvert into a navigable water.

2. The language of the CWA does not require Bonhomme to have intentionally added arsenic into the water in order for him to be liable for the addition.

The CWA defines a discharge of pollutants as "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). There is no requirement in the statute that a polluter have *intended* to add the pollutants. The Act was designed with a broad purpose in order to hold polluters like Bonhomme liable for their additions of pollutants, regardless of their intentions. *See* 33 U.S.C. § 1251 (2006). Indeed, "[t]he Act would be severely weakened if only intentional acts were proscribed." *Earth Sciences*, 599 F.2d at 374 (noting that willful or negligent violations are punishable by criminal penalties under other provisions of the Act). Accordingly, Bonhomme's lack of intention is insufficient to shield him from liability in connection with his discharge.

In conclusion, even if this Court were to find that Reedy Creek is a navigable water, it is Bonhomme, not Maleau, that is liable under the CWA for the presence of arsenic in the creek.

CONCLUSION

For these reasons, this Court should uphold the grant of Maleau's motion to dismiss Bonhomme's suit and overturn the district court's ruling that Reedy Creek is a navigable water.